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93-1004

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

LEON CLIFFORD FOSTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

JOSEPH DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether, to establish a violation of the drug conspiracy statute, 21 U.S.C. 846, the government must prove an overt act in furtherance of the conspiracy.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	8
Appendix A	1a
Appendix B	13a
Appendix C	14a

TABLE OF AUTHORITIES

Cases:

Nash v. *United States*, 229 U.S. 373 (1913)	6
Singer v. *United States*, 323 U.S. 338 (1945)	6
United States v. *Garza*, 980 F.2d 546 (9th Cir. 1992)	4
United States v. *Harrison-Philpot*, 978 F.2d 1520 (9th Cir. 1992), cert. denied, 113 S. Ct. 2392 (1993)	4
United States v. *Olano*, 113 S. Ct. 1770 (1993)	7
United States v. *Shabani*, 993 F.2d 1419 (9th Cir. 1993), petition for cert. pending, No. 93-981 (filed Dec. 21, 1993)	6, 7, 8

Statutes and rule:

18 U.S.C. 924(c)(1)	2
21 U.S.C. 844	2
21 U.S.C. 846	2, 6, 7
Fed. R. Crim. P. 52(b)	7

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

LEON CLIFFORD FOSTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is unreported, but the judgment is noted at 978 F.2d 716 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1992. A petition for rehearing was denied on August 24, 1993. App., *infra*, 13a. On November 15, 1993, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 22, 1993. App.,

infra, 14a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, respondent was convicted of conspiring to manufacture methamphetamine, in violation of 21 U.S.C. 846 (Count 1); possessing a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Count 2); and possessing methamphetamine, in violation of 21 U.S.C. 844 (Count 3). He was sentenced to 204 months' imprisonment, to be followed by five years' supervised release. Gov't C.A. Br. 2. The court of appeals reversed the conspiracy and the firearm convictions, affirmed the conviction for possession, and remanded for further proceedings. App., *infra*, 1a-12a.[1]

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[1] Respondent was tried along with co-defendant Sandra Lee Ward. Ward was charged with and convicted of conspiring to manufacture and distribute methamphetamine, in violation of 21 U.S.C. 846. She was sentenced to 120 months' imprisonment, to be followed by five years' supervised release. Gov't C.A. Br. 2 n.3. The court of appeals affirmed her conviction and sentence in an unpublished memorandum decision. *United States* v. *Ward*, 935 F.2d 277 (9th Cir. 1991) (Table). On

1. The evidence at trial showed that from June 1988 through March 1989, respondent and co-defendant Sandra Lee Ward devised and began implementing a plan to manufacture methamphetamine. During that period, respondent had Ward purchase more than $16,000 worth of laboratory equipment and chemicals from the Grau-Hall Chemical Company in Sacramento, California. Ward's purchases, made with cash supplied by respondent, included hydriotic acid and red phosphorous (two chemical precursors of methamphetamine), "Vita Blend" (a cutting agent commonly used for methamphetamine), and glassware. Ward delivered that material to respondent. Gov't C.A. Br. 5-7.

On March 1, 1989, the police executed search warrants at respondent's residence and at a separate property that he leased. At respondent's residence, the police found a bag of methamphetamine in respondent's bedroom, a grinder containing traces of methamphetamine, and the cutting agent "Vita Blend." Also on March 1, the police arrested respondent as he was leaving the other property in his truck. At the time of his arrest, respondent was carrying $2800 in cash and a note containing the names of chemicals and prices. In respondent's truck, the police found a loaded nine-millimeter handgun, a triple-beam scale, and plastic bags of the type used to store drugs. Gov't C.A. Br. 7-8; App., *infra*, 7a.

At trial, respondent testified in his own defense. He denied that he had directed Ward to buy the equipment and chemicals for manufacturing methamphetamine. App., *infra*, 4a.

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appeal, Ward did not raise the issue on which the court of appeals reversed in the present case.

2. The Ninth Circuit reversed respondent's conspiracy and firearm convictions (Counts 1 and 2), affirmed his conviction for possession of methamphetamine (Count 3), and remanded for further proceedings. App., *infra*, 1a-12a.

The court of appeals held, first, that the district court erred by failing to instruct the jury that to establish the conspiracy offense the government was required to prove that an overt act in furtherance of the conspiracy had been committed. App., *infra*, 2a. The court relied on prior Ninth Circuit decisions holding that "the omission of this element from a jury instruction is error." *Ibid.*, citing *United States* v. *Harrison-Philpot*, 978 F.2d 1520 (1992), cert. denied, 113 S. Ct. 2392 (1993), and *United States* v. *Garza*, 980 F.2d 546 (1992).

The court of appeals further held that the failure to instruct the jury that the government was required to prove an overt act was not harmless error on the facts of this case. App., *infra*, 2a-5a. The court rejected the government's argument that in convicting respondent for possession of methamphetamine, the jury necessarily had found that an overt act in furtherance of the conspiracy had occurred. The court reasoned that "[b]ecause there was no evidence of actual production [of methamphetamine], it was impossible to determine if the drugs found in [respondent's] bedroom could have been produced by the same processing method intended by the conspiracy." *Id.* at 3a. The court further determined that other evidence regarding overt acts—namely, Ward's purchases of material that could be used to manufacture methamphetamine—was disputed. *Id.* at 4a-5a. The court concluded that "the jury could have found evi-

dence of an agreement without finding that any substantive overt act was committed in furtherance of the conspiracy charged in count one." *Id.* at 5a.

The court of appeals next held that the evidence was sufficient to support respondent's conviction for possession of methamphetamine. It reasoned:

> [I]t would not be plain error for a jury to infer that [respondent] had dominion and control over the methamphetamine based upon [respondent's] admitted knowledge of his wife's drug use and his joint control over and access to the apartment and bedroom where the drugs were discovered. In addition, there was circumstantial evidence such as the vita-blend, scales, baggies and gun which the jury may have relied upon in finding that [respondent] possessed the drug with knowledge.

App., *infra*, 7a.

The court of appeals rejected respondent's challenge to the district court's conduct of the voir dire. App., *infra*, 7a-9a.

Finally, with respect to respondent's claim that he was deprived of due process by the court reporter's delay in preparing the trial transcript for respondent's appeal, the court of appeals remanded the case to the district court for a determination of whether respondent was prejudiced by the delay. App., *infra*, 10a-12a.

REASONS FOR GRANTING THE PETITION

This case presents the same issue as *United States* v. *Shabani*, 993 F.2d 1419 (9th Cir. 1993), in which we have filed a petition for a writ of certiorari, No. 93-981 (filed Dec. 21, 1993).[2] Here, as in *Shabani*, the Ninth Circuit held that in a prosecution under the drug conspiracy statute, 21 U.S.C. 846, the government must prove that an overt act in furtherance of the conspiracy was committed. App., *infra*, 2a. That holding, as the Ninth Circuit recognized in *Shabani*, 993 F.2d at 1421 & n.1, squarely conflicts with the decisions of every other circuit with criminal jurisdiction. Moreover, as we have explained in our petition in *Shabani* (at 5-9), the Ninth Circuit's holding conflicts with the language of Section 846, which contains no overt act requirement, and with this Court's decisions in *Singer* v. *United States*, 323 U.S. 338 (1945), and *Nash* v. *United States*, 229 U.S. 373 (1913), which make clear that a criminal conspiracy statute that does not contain an express overt act requirement does not require proof of an overt act. Finally, the question whether Section 846 requires proof of an overt act is an important and recurring issue; it arises in every trial under Section 846, and the Ninth Circuit's erroneous resolution of that question will result in the reversal of valid convictions for drug conspiracies, as this case and *Shabani* show. For those reasons, and because the Ninth Circuit's denial of rehearing en banc in *Shabani* shows that that court will not correct its own error, review by this Court is warranted.

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[2] We have furnished counsel for respondent with a copy of our certiorari petition in *Shabani*.

We believe that *Shabani* is a better vehicle than this case for review by this Court of the question whether 21 U.S.C. 846 requires proof of an overt act in furtherance of the conspiracy. For one thing, respondent in this case did not raise that issue in the district court; he raised it for the first time on appeal. The district court's failure to instruct the jury that the government was required to prove an overt act is therefore subject to reversal only for "plain error." See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 113 S. Ct. 1770, 1776-1779 (1993). A decision by this Court limited to the question whether the district court committed plain error would not necessarily resolve cases in which a defendant timely raises the question presented here. That concern does not obtain in *Shabani*, because respondent there did raise the question in a timely manner. Consequently, the issue in *Shabani* was fully briefed and squarely addressed by both lower courts. Moreover, in *Shabani* the court of appeals addressed the issue at length in a published opinion. Here, by contrast, the Ninth Circuit resolved the issue without discussion in an unpublished opinion.

If the Court grants certiorari in *Shabani*, its decision on the merits would affect the outcome of this case. The Court should therefore hold the petition in this case and then dispose of it as appropriate in light of the disposition of the petition and any decision on the merits in *Shabani*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *United States* v. *Shabani*, No. 93-981 (filed Dec. 21, 1993).

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

JOSEPH DOUGLAS WILSON
Attorney

DECEMBER 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-10405

D.C. No. CR-89-113-EJG

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LEON C. FOSTER, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Arizona
Jack Tanner, District Judge

Argued and Submitted July 13, 1992
San Francisco, California

[Filed Oct. 16, 1992]

Before: WALLACE, Chief Judge, POOLE, Circuit Judge, and MARSH, District Judge **

MEMORANDUM *

Defendant-appellant, Leon Clifford Foster, appeals his conviction, following a jury trial, for conspiracy

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Honorable Malcolm F. Marsh, United States District Judge for the District of Oregon, sitting by designation.

to manufacture methamphetamine in violation of 21 U.S.C. § 841(a)(1) and § 846, possession of a firearm in relation to a drug transaction in violation of 18 U.S.C. § 924; and possession of methamphetamine in violation of 21 U.S.C. § 844. Foster raises numerous claims of error in this appeal and for the reasons which follow, we reverse in part, affirm in part and remand.

1. *Conspiracy Instruction*

Appellant's first claim is that the district court erred by failing to instruct the jury that proof of an overt act is necessary to convict him of a drug conspiracy. As we have recently held, the omission of this element from a jury instruction is error. *United States v. Harrison-Philpot*, No. 89-30212, slip op. 7907, 7916 (9th Cir. July 2, 1992); and *United State*[*s*] *v. Garza*, No. 91-30240, slip op. 7425, 7437 (9th Cir. June 29, 1992). However, such an error is harmless if "no rational jury could have made [its] findings without also finding the omitted or presumed fact to be true." *Garza*, slip op. at 7437 (quoting *Martinez v. Borg*, 937 F.2d 423, 425 (9th Cir. 1991)).

In both *Harrison-Philpot* and *Garza* we held that the failure to include the overt act element of the conspiracy instruction was harmless.[1] However, unlike *Harrison-Philpot* and *Garza*, application of the harmless error standard to the facts in this case poses a difficult task.

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[1] In this case, as in *Harrison-Philpot* and *Garza*, the jury was instructed that in order to convict the defendant of conspiracy, the government must establish: (1) the existence of an agreement to violate the Controlled Substances Act; and (2) that the defendant joined the conspiracy.

First, *Garza* is clearly distinguishable from the instant case because the jury also convicted Garza on a separate count which charged him with a substantive offense of distribution in furtherance of the conspiracy. *Id.*, at 7437. In this case, there was no separate substantive charge against Foster which constituted an overt act in furtherance of the conspiracy to manufacture methamphetamine as charged in count one. The government attempts to rely upon Foster's conviction for possession of methamphetamine charged in count three to harmonize this with *Garza*. However, there was no evidence connecting the methamphetamine found in Foster's bedroom to the alleged conspiracy to manufacture methamphetamine. No lab or lab equipment was ever found and the evidence, when viewed in the light most favorable to the government, indicated that only two of the approximately seven necessary precursor chemicals were purchased prior to Foster's arrest. Because there was no evidence of actual production, it was impossible to determine if the drugs found in the bedroom could have been produced by the same processing method intended by the conspiracy. Finally, in sentencing the defendant on the conspiracy count, the court determined that the drugs seized in the bedroom did not adequately reflect the scope of the conspiracy and, instead, relied solely upon the chemical purchases of co-defendant Sandra Ward to approximate the quantity of methamphetamine producible by the conspiracy.

Although *Harrison-Philpot* also involved seven substantive counts of cocaine distribution, we found that her convictions on these counts could not satisfy the overt act requirement of the conspiracy charge because the jury was also instructed on a Pinkerton theory. Slip op. at 7916, n.3. However, Harrison-

Philpot testified at trial, admitting that she was a drug user and conceding that she assisted in drug distribution. *Id.*, at 7911. Her only defense was that she was not involved in the conspiracy on the *date* alleged in the indictment. We rejected Philpot's challenge that the indictment impermissibly left the effective dates of the conspiracy open-ended by use of terms such as "sometime around," and noted the existence of overwhelming and undisputed evidence that "a large distribution ring was being run out of Philpot's home." In light of the undisputed evidence of substantive illegal acts, we determined that the jury "necessarily found that an agreement to distribute cocaine existed [since] there was no evidence of such an agreement . . . apart from the innumerable overt acts." *Id.*, at 7917. Thus, in a conviction for a drug conspiracy, if a jury, in reaching its verdict, necessarily must have found the existence of the missing element, the error is harmless. Conversely, if a reasonable jury could have convicted a defendant without finding the omitted element, a new trial is necessary.

Our decision in *Harrison-Philpot* is distinguishable from the facts in this case in at least two critical respects. First, in this case there *was* direct evidence of an "agreement" based upon Ward's statements that she agreed to purchase chemicals at Foster's direction and knew that he was probably manufacturing drugs. Second, the key facts establishing the overt acts in this case were disputed by Foster in each material respect. At trial, Ward testified that she made the purchases at Foster's direction and delivered them to his house. However, Foster testified at trial and refuted each of these assertions. The chemicals Ward said she purchased were never found

and the government's corroboration of Ward's version of events was tenuous. Although the jury may well have believed Ward's testimony over Foster's testimony about these sales, the court's failure to instruct the jury that it had to find that there was an overt act committed in furtherance of the conspiracy charged meant that the jury could convict the defendant without resolving this critical factual dispute. Thus, in this case, the jury could have found evidence of an agreement without finding that any substantive overt act was committed in furtherance of the conspiracy charged in count one.

In addition, the evidence that Foster conspired to manufacture methamphetamine is far less substantial than the evidence in *Harrison-Philpot* or *Garza*, particularly when we compare the crime charged to the evidence. The convictions for conspiracy to distribute controlled substances in *Harrison-Philpot* and *Garza* rested upon evidence of numerous completed drug transactions. However, in this case Foster was charged with conspiring to manufacture methamphetamine based largely upon disputed evidence that Ward obtained two precursor chemicals and delivered them to Foster. The two precursors allegedly purchased by Ward were never located.

Thus, in comparing the evidence in this case against the scope of the charge against defendant, we find that a rational jury could have convicted Foster of conspiracy without finding that any member of the conspiracy committed an overt act in furtherance thereof. Accordingly, we conclude that the erroneous instruction was not harmless and that Foster is entitled to a new trial on the charges contained in counts one and two.

Because of this finding, we need not decide several of Foster's other claims of error. However, in addi-

tion to challenging the sufficiency of the evidence to support his conviction for count three, Foster also raised several claims which we find are errors which will require correction on remand.

2. *Sufficiency of the Evidence: Possession*

This court reviews the sufficiency of the evidence to determine whether "reviewing the evidence in the light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992), *pet. for cert. filed* July 27, 1992. Circumstantial evidence and inferences drawn therefrom will be sufficient to sustain a conviction. *Id.* Because defendant did not move for judgment of acquittal at the close of his case, this court reviews the sufficiency of the evidence arguments only for "plain error to prevent a miscarriage of justice." *United States v. Winslow*, 962 F.2d 845, 850 (9th Cir. 1992).

Foster contends that there was insufficient evidence to convict him of possession of the methamphetamine found in the bedroom at the apartment on Jones Road.

To prove constructive possession, the government must prove that defendant had "sufficient dominion and control to give him the power of disposal." *United States v. Hernandez*, 876 F.2d 774, 778 (9th Cir.) (quoting *United States v. Castillo*, 866 F.2d 1071, 1086 (9th Cir. 1989)[)], *cert. denied*, 493 U.S. 863 (1989). Thus, mere proximity to the contraband, presence in a location where contraband is found or association with persons having control over contraband are insufficient. *Id.* A possessory interest in the

location searched raises an "inference" of constructive possession. *Id.*

In this case it would not be plain error for a jury to infer that appellant had dominion and control over the methamphetamine based upon Foster's admitted knowledge of his wife's drug use and his joint control over and access to the apartment and bedroom where the drugs were discovered. In addition, there was circumstantial evidence such as the vita-blend, scales, baggies and gun which the jury may have relied upon in finding that Foster possessed the drug with knowledge. Accordingly, we affirm his conviction on count three.

3. *Voir Dire*

We review the sufficiency of voir dire questions for "abuse of discretion." *United States v. Dischner*, 960 F.2d 870, 890 (9th Cir. 1992). A trial court's exercise of discretion with respect to voir dire is limited by the need to assure a fair trial by an impartial jury. *United States v. Jones*, 722 F.2d 528, 529 (9th Cir. 1983). One of the rationales behind this rule is to preserve the right of a defendant to "exercise his peremptory challenges intelligently." *United States v. Baldwin*, 607 F.2d 1295, 1297 (9th Cir. 1979) (quoting *Cook v. United States*, 379 F.2d 966, 971 (5th Cir. 1967)).

In *Jones*, this court identified three instances in which there may be a need for specific voir dire questioning: (1) where the case carries racial overtones; (2) when the case involves matters in which the community is known to harbor strong feelings (such as the insanity defense); or (3) when the case involves other forms of bias (such as the tendency of some

jurors to overvalue testimony of government agents). *Jones*, 722 F.2d at 529-30, (citations omitted).

Although the discretion accorded a trial judge in conducting voir dire is extremely broad, "he must exercise a sound judicial discretion in the acceptance or rejection of supplemental questions proposed by counsel," especially in those instances in which the judge decides to conduct the voir dire. *Baldwin*, 607 F.2d at 1297. For example, we have rejected an appeal where the trial court refused to question the jury regarding general attitudes about the theory of the defense. *See e.g. Jones*, 722 F.2d at 530 (coercion defense); *compare United States v. Goland*, 959 F.2d 1449, 1454 (9th Cir. 1992) (questions about campaign participation and familiarity with election laws adequately tested juror bias in trial for violations of Federal Election Campaign Act).

First, we find that defendant has come forward with evidence to show that cock fighting is a concern in the state of California as evidenced by the 1988 statute which criminalizes such activity. Assuming the community harbors strong feelings about cockfighting, we conclude that Foster's activities as a chicken rancher and fancier of gamecock fighting was collateral both to the case and his defense at trial. If Foster wants to prevent the jury from hearing evidence about cockfighting at the retrial, he may tailor his defense to eliminate such references and move *in limine* to exclude any references to cockfighting as prejudicial. Foster's defense that he raised chickens, however, is not impaired by exclusion of the cockfighting issue. Because this issue is collateral both to the subject matter of this case and to Foster's defense, we hold that the district court did not abuse

its discretion in declining to question the jury on this issue.

4. *Due Process*

a. *Failure to record the jury instructions*

There is no dispute that the court, by his own local custom, did not have the jury instructions recorded. Judge Tanner read the instructions to the jury and filed a copy of what he read in the original file. Neither party raised an objection to the procedure at the time of trial. Following appellant's Rule 10(c) motion, the district court entered an order certifying that the jury instructions filed were the jury instructions actually given.

Pursuant to 28 U.S.C. § 753(b), court reporters are required to record verbatim "all proceedings in criminal cases had in open court." The provisions of § 753 are mandatory and supplant any inconsistent local custom. However, a violation of the Act does not require reversal unless the complainant can demonstrate specific prejudice. *United States v. Antoine*, 906 F.2d 1379, 1381 (9th Cir.), *cert. denied*, 111 S.Ct. 398 (1990); and *United States v. Carillo*, 902 F.2d 1405, 1409-10 (9th Cir. 1990). Lack of a verbatim transcript is not a substantial omission or a constitutional defect when a suitable alternative is provided.

In this case, after the issue was re-submitted to the district court pursuant to Fed. R. App. P. 10, he settled the record following written submissions from counsel. Foster attempts to create a factual dispute because Ward's counsel apparently could not remember if the "supplemental instruction" he requested was on intent or knowledge. However, all counsel

who could recall the proceeding confirmed the judge's finding that the filed instructions accurately reflected what was read to the jury. Thus, there is no factual dispute which would give rise to prejudice or the need for an evidentiary hearing.

The reporter's failure to record the jury instructions is a violation of section 753(b), which should not be repeated in the event of a retrial. However, because Foster has failed to demonstrate prejudice, we find the error harmless.

b. *Court Reporter's Delay*

Foster contends that his appellate process was delayed for twenty-six months due to the court reporter's failure to timely prepare and file complete trial transcripts.

Courts have recognized that extreme delay in processing an appeal may amount to a violation of due process. *Antoine*, 906 F.2d at 1382. In *United States v. Tucker*, 964 F.2d 952 (9th Cir. 1992), we exercised our supervisory power to reverse a conviction for a court reporter's three year delay in preparing transcripts on appeal. We employed the following four-part test adopted in *Antoine* to evaluate whether the delay resulted in a violation of appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) defendant's assertion of his right to a timely appeal; and (4) the degree of prejudice to the defendant. *Id.*, at 954. The last element requires examination of three factors: "1) oppressive incarceration pending appeal; 2) anxiety and concern of the convicted party pending appeal; and 3) impairment of the convicted person's grounds for appeal or of the viability of his defense in case of

retrial." *Id.*, at 954-55, *citing Coe v. Thurman*, 922 F.2d 528, 532 (9th Cir. 1990).

Under the circumstances in *Tucker*, we found that "nearly all" of the three year delay in processing the appeal was attributable to the court reporter. We emphasized that the reporter had failed to respond in a timely fashion even after seven orders from this court which culminated in a final order directing her to complete the transcript or be placed under arrest by the U.S. Marshal. In *Antoine*, we noted a three year delay was a "substantial amount of time," and found that at least two years of that time was attributable to the "unwillingness or inability of the court reporter to produce the transcript of the trial." 906 F.2d at 1382. However, we declined to reverse his conviction, finding instead that any determination of prejudice was premature since it was uncertain "whether the delay has impaired Antoine's grounds for appeal or may impair his defense in the event of retrial." *Id.*, at 1383.

Of the twenty six month delay in processing this appeal, at least three months were due to Foster's delay in complying with this court's order that he comply with Fed. R. App. P. 10(c) and attempt to reconstruct the record. Assuming that the delay attributable to the government in this case was approximately two years, that is the same amount of time which we held was "substantial" in *Antoine*. The delay appears to be largely attributable to the court reporter. Thus, the first and second elements of the *Antoine* test favor Foster.

As in *Antoine*, the assessment of prejudice is more problematic. The fact that Foster has been incarcerated "awaiting the outcome of the appeal" is not oppressive if a conviction is affirmed. *Antoine*, 906

F.2d at 1382; and *Coe*, 922 F.2d at 532. However, these cases leave open the question of whether incarceration might be oppressive if the conviction is reversed *and* remanded.

Because we remand this case for a new trial, we will follow *Antoine* and remand the issue of prejudice attributable to the delay to the district court for factual findings as to the first two counts of the indictment.

All other claims of error are mooted by this disposition.

Appellant's conviction for possession of methamphetamines is AFFIRMED. Appellant's convictions for conspiracy to manufacture methamphetamine, and for possession of a firearm are REVERSED, and the case is REMANDED for further proceedings consistent with this disposition.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-10405

D.C. No. CR-89-0113-02-EJG

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

-vs-

LEON CLIFFORD FOSTER, DEFENDANT-APPELLANT

[Filed Aug. 24, 1993]

Before: WALLACE, Chief Judge, POOLE, Circuit Judge, and MARSH,* District Judge.

ORDER DENYING REHEARING

The panel as constituted above has voted to deny the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

---

* Honorable Malcolm F. Marsh, United States District Judge, District of Oregon, sitting by designation.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-416

UNITED STATES, PETITIONER

v.

LEON FOSTER

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 22nd, 1993.

/s/ Sandra Day O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 15th day of November, 1993.

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ORIGINAL (2)

ORIGINAL

Supreme Court, U.S.
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No. 93-1004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

LEON CLIFFORD FOSTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Michael R. Levine
Assistant Federal Public Defender
851 S.W. Sixth Avenue, Suite 1375
Portland, Oregon
(503) 326-2123
Counsel for Respondent
Leon Clifford Foster

ORIGINAL

I. STATEMENT OF THE CASE

Respondent accepts the government's statement of the case as set forth in its petition.[1]

II. REASONS FOR NOT GRANTING THE PETITION

A. This court should not grant the government's petition merely to correct an error of law.

Assuming, for the sake of argument, that the Ninth Circuit erred in holding that in a Section 846 conspiracy the trial court is required to instruct the jury that it must find an overt act, this Court should not grant the government's petition. As Chief Justice Rehnquist has admonished, we "must never forget that this Court is not a forum for the correction of errors." Boag v. MacDougall, 454 U.S. 364, 367 (1982) (Rehnquist, C.J., dissenting). Justice Stevens has similarly noted that the certiorari jurisdiction of the Supreme Court is "designed to serve purposes broader than the correction of error in particular cases." Watt v. Alaska, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring). See also Dobbs v. Zant, 113 S.Ct. 835, 836 (1993) (Scalia, J., concurring).

In sum, this Court should not grant the government's petition merely because the decision below may be erroneous.

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[1]However, the instant case arose in the Eastern District of California, not, as the government asserts and as the first page of the slip opinion mistakenly states, in the District of Arizona.

B. That the Ninth Circuit requires proof of an overt act in an 846 conspiracy is not an important and recurring issue.

In asking this Court to grant certiorari, the government asserts that the question whether Section 846 requires proof of an overt act is "important and recurring." Pet. 6. This is not so. As far as undersigned counsel can determine, there are only a handful of cases in which the Ninth Circuit has ever reversed a conviction for failure to instruct the jury on the overt act requirement.[2] Hence, contrary to the government's suggestion, the issue is not important and recurring.

It is no surprise that instances of reversal are few. In the first place, it is the rare case indeed where the government chooses to (or needs to) allege a conspiracy without also alleging an overt act. This is so because an overt act is so easy to allege and prove; after all, it may be any act, however innocuous, that serves in amy manner to further the conspiracy. Chavez v. United States, 275 F.2d 813, 817 (9th Cir. 1960) (overt act may appear wholly innocent); 8.05A Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992)("an overt act does not itself have to be unlawful"); 2 LaFave and Scott, Substantive Criminal Law (1986) § 6.5 at p. 95 ("virtually any act will satisfy the overt act requirement").

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[2]These cases are 1) the case at bar, an unpublished decision; 2) United States v. Shabani, 993 F.2d 1419 (9th Cir. 1993), pet. for cert. pending, No. 93-981 (filed Dec. 21, 1993); and 3) United States v. Simpson, 10 F.3d 645 (9th Cir. 1993).

In the second place, even if an indictment does not allege an overt act, it will commonly allege the functional equivalent; namely, a substantive crime committed during, or in furtherance of, the conspiracy. In this event, any error arising from the failure of the court to instruct on the overt act requirement is harmless. See United States v. Garcia, 988 F.2d 965, 969 (9th Cir. 1993) (omission of overt act element harmless where the jury's determination of guilt on another substantive count served as the functional equivalent of a finding of an overt act); United States v. Baldwin, 987 F.2d 1432, 1439 (9th Cir. 1993)(same); United States v. Harrison-Philpot, 978 F.2d 1520, 1526-27 (9th Cir. 1992), cert. denied 113 S.Ct. 2392 (1993).

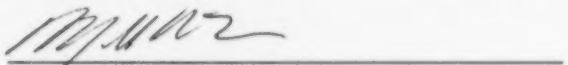
In its petition for certiorari in Shabani, the government argues that, if applied beyond Section 846, the Ninth Circuit's analysis would "call into question" the construction of many criminal conspiracy statutes that contain no express overt act requirement, for example, the civil rights conspiracy statute, 18 U.S.C. Sec. 241. Shabani Pet. at 16. The instant case, however, unlike Shabani, is unpublished. Hence, the government understandably does not make the same argument here. In any event, the government's concerns are groundless. See Shabani, 993 F.2d at 1420-21 ("when we have interpreted other conspiracy statutes that are silent on the subject, we have held that proof of any overt act is unnessary); United States v. Skillman, 922 F.2d 1370, 1375-76 (9th Cir. 1990) (Section 241 conspiracy does not require overt act), cert. dismissed, 112 S.Ct. 353 (1991).

In sum, contrary to the government's argument, the issue raised in its petition is neither important nor recurring. This Court should not waste its scarce resources in granting certiorari either to Shabani or to the case at bar.

C. Even assuming this Court grants certiorari in Shabani, it should deny certiorari in the instant case.

The government suggests that the Court should hold the instant case pending the Court's decision in Shabani. Pet. 7. Respondent disagrees. Unlike Shabani, the instant case is unpublished. Hence, it is valueless as precedent and may not even be cited. See Ninth Circuit Rule 36-3; DiMartini v. Ferrin, 889 F.2d 922, 929 (9th Cir. 1989). Accordingly, even should the Court grant certiorari in Shabani, the Court should deny it here.

RESPECTFULLY SUBMITTED this January 25, 1994.



Michael R. Levine
Attorney for Respondent

No. 93-1004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

LEON CLIFFORD FOSTER,

Respondent.

CERTIFICATE OF SERVICE

I, Michael R. Levine, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within MOTION TO LEAVE TO PROCEED *IN FORMA PAUPERIS* and RESPONDENT'S BRIEF IN OPPOSITION TO GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI on the counsel for the respondent by depositing in the United States Post Office, in Portland, Oregon, on January 24, 1994, first class postage prepaid, a certified true, exact, and full copy thereof addressed to:

Drew S. Days III
Solicitor General
Department of Justice, #5614
10th and Constitution
Washington, D.C. 20530

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Further, the original and twelve (12) copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C. 210543, for filing on January 24, 1994, with first-class postage prepaid.

DATED this January 25, 1994.

Michael R. Levine
Attorney for Respondent.

SUBSCRIBED AND SWORN TO BEFORE ME this 25th day of JANUARY, 1994.

Notary Public for Oregon